(15)



# SUPREME COURT
# OF THE UNITED STATES
## OCTOBER TERM, 1943

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No. 419

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AUGUSTUS E. STALEY, JR., Executor of the Last Will and Testament of Augustus E. Staley, Sr., deceased,
*Petitioner and Appellant below,*

vs.

COMMISSIONER OF INTERNAL REVENUE,
*Respondent and Appellee below.*

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BRIEF OF PETITIONER, AUGUSTUS E. STALEY, JR., EXECUTOR OF THE LAST WILL AND TESTAMENT OF AUGUSTUS E. STALEY, SR., (deceased) IN SUPPORT OF HIS PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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# INDEX TO BRIEF

## SUBJECTS

PAGE

**A. The writ of certiorari should be granted** .......... 2-9

Point 1. The Circuit Court of Appeals for the Fifth Circuit has rendered a decision in conflict with the decisions of other Circuit Courts of Appeal on the same matter...... 2-6

Point 2. The Circuit Court of Appeals for the Fifth Circuit has decided a Federal question in a way probably in conflict with decisions of the Supreme Court of the United States.. 6-7

Point 3. The Circuit Court of Appeals for the Fifth Circuit has made a retro-active holding .............................. 7-9

**B. The decision of the Circuit Court of Appeals for the Fifth Circuit should be reversed on the merits** 9-24

Point 4. The consideration was not income within definition of Revenue Act............... 9-10

Point 5. The consideration was not income under Section 167 of the Revenue Act.........10-18

Point 6. The \$150,000.00 consideration received by the grantor-seller, Mr. Staley, Sr., was a restoration of capital......................18-19

Point 7. Consideration .......................19-21

Point 8. The trust instruments were contracts..21-23

Point 9. The taxpayer had the right to exact a payment as consideration ................23-24

## AUTHORITIES REFERRED TO

### 1. *Table of Cases*

A.

Aetna Insurance Company v. Boon, 95 U. S. 117.... 22

American Net and Twine Co. v. Worthington, 141 U. S. 468-474................................ 21

II.

PAGE

B.

Barnes v. Alexander, 232 U. S. 117.................. 9
Bowers v. Kerbaugh Empire Co., 271 U. S. 170..... 10
Blair Engineering Company v. Page Steel and Wire Company, 288 Fed. 662.......................... 20
Bradley v. Washington, Alexandria and Georgetown Packet Co., 38 U. S. 89.......................... 23

C.

Cassinelli v. Stacy, (Ky.) 3 S. W. (2d) 980.......... 20
Chenango Bridge Co. v. Binghamton Bridge Co., 70 U. S. 51.................................... 22
Cuneo Press, Inc. v. Claybourn Corp., 90 Fed. (2d) 233; 236 .................................. 21
Curran v. Commissioner of Internal Revenue, 49 Fed. (2d) 129 ...............................2, 4, 13, 19

D.

De Ganay v. Lederer, 250 U. S. 376................... 17
Delaware Inc. Co. v. Greer (DC) 120 Fed. 916....... 18
Delaware and Hudson Canal Company v. Pennsylvania Coal Company, 75 U. S. 276............... 23
Donahoe v. Rich, (Ind.) 28 N. E. 1001.............. 20
Doyle v. Mitchell Bros. Co., 247 U. S. 179.......... 10
Dundas v. Hitchcock, 53 U. S. 256.................. 22

E.

Eidman v. Martinez, 184 U. S. 578.................. 21
Eisner v. Macomber, 252 U. S. 189.................10, 18

F.

Farrell v. Third Nat. Bank in Nashville, (Tenn.) 101 S. W. (2d) 158.............................. 16
Florida Central Railroad Company v. Schutte, 103 U. S. 118 ..................................... 22
Frazer v. Stokes (Va.), 71 S. E. 545............... 24

G.

George v. Tate, 102 U. S. 564...................... 23
Goodrich v. Edwards, 255 U. S. 527............... 10
Green v. Biddle, 21 U. S. 1, 8th Wheat. 1.......... 22

PAGE

H.

Harriman, The v. Emerick, 76 U. S. 161........... 23
Hartranft v. Wiegmann, 121 U. S. 609............. 21
Helvering v. Falk, 291 U. S. 183....................6, 18
Helvering v. Griffiths, 317 U. S. ..; 87 L. ed. 597; 63 S. Ct. 636 ....................................8, 12
Hutchison v. Ross, (N. Y.) 187 N. E. 65............22, 23

I.

Imperial Fire Insurance Company v. Coos County, 151 U. S. 452.................................. 18

K.

Ketcham v. Miller, (Texas) 37 S. W. (2d) 635....... 23
Knowlton v. Moore, 178 U. S. 41.................. 21

L.

Lobban v. Wierhauser, (Texas) 141 S. W. (2d) 384..16, 21

M.

Merchants Loan & Trust Co. v. Smietanka, 255 U. S. 509 ........................................... 10
Martha Stevens v. Nane-McCord Mercantile Co., (CCA-8) 150 Fed. 71, 75....................... 18

O.

Ogden v. Saunders, 25 U. S. 213.................. 23

P.

Pass v. Stephens, (Ariz.) 198 P. 712............... 24

R.

Robert Hoe Estate Co., Inc. v. Commissioner, 85 Fed. (2d) 4 ......................................4, 19

S.

Shellabarger v. Commissioner of Internal Revenue, 38 Fed. (2d) 566 ...........................9, 14, 19
Strattons Independence v. Howbert, 231 U. S. 399... 10
Standard Life & Accident Ins. Co. v. McNulty, (DC) 157 Fed. 224, 226............................ 18

PAGE

T.

The Harriman v. Emerick, 76 U. S. 161 ........... 23
Townsley v. Sumrall, 2nd Peters 170-182 ............ 21

U.

Underhill v. United States Trust Co., (Ky.) 13 S. W. (2d) 502 ........................... 21
United States v. Deans (CCA-8) 230 Fed. 957 ....... 18
United States v. Isham, 17th Wall. 496 ............. 21
United States v. Ludey, 274 U. S. 295 .............. 18
United States v. Linn, et al., 15th Peters 290 ........ 21
U. S. v. Merriam, 263 U. S. 179 ....................9, 17
United States v. Ninety-Nine Diamonds (CCA-8) 139 Fed. 961, 965 .......................... 18

## 2. *Textbooks*

B.

Bogart, Trusts and Trustees, Vol. 1, ch. 12, sec. 204, page 579 ..................................23, 24

C.

Consideration in Equity, Roscoe Pound, 13 Ill. Law Review 669 ............................ 21
Consideration in Equity, Roscoe Pound, 13 Ill. Law Review 667 ............................ 23

P.

Paul on Federal Estate and Gift Taxation, Vol. 1, sec. 7.32, page 392 ........................ 11
Paul on Federal Estate and Gift Taxation, Vol. 1, sec. 7.28, page 383 ........................ 11
Paul on Federal Estate and Gift Taxation, Vol. 1, sec. 7.01, page 283; 283-284 ................ 11
Paul on Federal Estate and Gift Taxation, Vol. 2, sec. 17.08, page 1152 ...................... 12
Perry on Trusts, 7th ed., Vol. 1, pages 109-110 ...... 22
Perry on Trusts, 7th ed., Vol. 1, page 111 .......... 23

PAGE

R.

Roscoe Pound, Consideration in Equity, 13 Ill. Law Review 669 .................................... 21
Roscoe Pound, Consideration in Equity, 13 Ill. Law Review 667 .................................... 23

S.

Scott, Law of Trusts, Vol. 1, sec. 10.3, page 75...... 14
Scott, Law of Trusts, Vol. 1, sec. 29 page 178...... 15
Scott, Law of Trusts, Vol. 2, sec. 197.2, page 1069-1070 15

W.

Williston on Contracts, Vol. 1, sec. 103c, page 209... 19
Williston on Contracts, Vol. 1, sec. 115a, page 242... 20

### 3. *Statutes*

Section 22(a) Revenue Act of 1934................ 9
Section 167 Revenue Act of 1934.................. 10

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**BRIEF OF PETITIONER, AUGUSTUS E. STALEY, JR., EXECUTOR OF THE LAST WILL AND TESTAMENT OF AUGUSTUS E. STALEY, SR., (deceased) IN SUPPORT OF HIS PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.**

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## A. THE WRIT OF CERTIORARI SHOULD BE GRANTED

**Point 1. The Circuit Court of Appeals for the Fifth Circuit has rendered a decision in Conflict with Decisions of other Circuit Courts of Appeal on the same matter.**

In the case at bar the Circuit Court of Appeals for the Fifth Circuit, by a divided court, has held that the payment of a named consideration by the Trustee to the grantor was income to the grantor. This consideration was exacted by the grantor in return for the conveyance of the trust res and under the terms of the trust instrument was to be paid by the trustee out of trust income arising from any future dividends which might be declared upon stocks held as trust res.

(a) *Curran v. Commissioner of Internal Revenue,* 49 Fed. (2d) 129, was decided by the Circuit Court of Appeals for the Eighth Circuit. In that case a deficiency assessment resulted from a payment, by way of credit on indebtedness, which came to the petitioner in that case through the form of a dividend declared by the Con P. Curran Printing Company. The position of the Commissioner was that the payment to the petitioner was a dividend from the above corporation, while the petitioner contended that it came as his portion of the payment of the consideration for a valuable building conveyed by him to the corporation. The court held that though the payment was in the form of a corporate dividend, it was in fact payment for a building, therefore, *a restoration of capital*, and not "taxable as income to the petitioner." In its opinion the court stated:

"The Board found there was a sale. It finds that 'it was finally agreed that the corporation would pay and he would take $150,000.00 for the property. The petitioner then executed and delivered the deed to the property which was recorded October 13, 1920. No payment was made to the petitioner on account of the transfer of the property in 1920.' The findings following the quotation just made leave no doubt of the view of the Board that this 'dividend' for $150,000.00 declared January 15, 1921, was really a payment of this purchase price. In this connection there is a significant statement in the opinion of the Board on the finding as follows: 'We are convinced from all the evidence that the petitioner intended that the corporation should pay $150,000.00 for the property. We also believe that the petitioner was satisfied with the action as taken by the corporation in declaring and paying the dividend.' We think the findings must be construed as being that the property was sold to the corporation, and that payment therefor was through the medium of this 'dividend.' *Further, it may be said that, once given the finding that this transaction was a sale, there is no support in the evidence for any view as to the dividend, except that it was in payment therefor.*

"Upon such findings, the Board could not properly affirm the action of the Commissioner that this payment to petitioner was taxable as a dividend. *The payment was, except in bare form, no dividend, but it was really a payment for property purchased at what the evidence shows was less than its real value.*" (Italics ours.)

Likewise, in the case at bar, Augustus E. Staley, Sr., was not a beneficiary under the trusts. There was a transfer by him of the trust res to the Trustee for the benefit of the cestui que trust. The trust instruments merely named Mr. Staley, Sr., the grantor, as the person who was to be paid the consideration fixed by the terms of an instrument providing for transfers of stock which constituted the

corpus of the trust estates. It clearly appears that the trusts would not be created except upon the express agreement and contract between the grantor, Mr. Staley, Sr., and the Trustee that said grantor would receive a consideratior of $150,000.00 for making the transfers. The consideration, as in *Curran v. Commissioner, supra,* was exacted by Mr. Staley, Sr., for the grant of certain res which he had not originally intended to convey. It was agreed that the Trustee would pay to Mr. Staley the above consideration for the stock transfer which was a greater number of shares than he originally intended to convey. The grantor then executed the trust instruments and transferred and delivered the stocks. It is evident that all interested parties intended that the Trustee should pay $30,000.00 for the stocks transferred in this transaction.

Clearly, the decision in the case at bar is in conflict with the decision of the Circuit Court of Appeals for the Eighth Circuit in *Curran v. Commissioner of Internal Revenue,* 49 Fed. (2d) 129.

(b) *Robert Hoe Estate Co., Inc., v. Commissioner of Internal Revenue,* 85 Fed. (2d) 4, was decided by the Circuit Court of Appeals for the Second Circuit. In that case it appeared that devisees of realty under a will which failed to provide for widow's dower formed a corporation to manage the realty and agreed with the widow that, in consideration of her conveyance and release of dower, the corporation would pay her annually an amount equal to one-third of the net annual income, or, on sale of any part of the realty, the corporation would pay her a gross sum in lieu of dower to be estimated according to the then value of an annuity. The corporation taxpayer's theory was that such agreement diverted one-third of the profits as they were received from the land directly to the

widow, and that she retained an interest in the land, whose profits, therefore, became her income as they accrued. The court, however, ruled that the income was that of the corporation taxpayer, and *represented a return of capital to the widow, not income.* In its opinion the court, at page 4, said:

> "Perhaps an agreement between the devisees and the widow, which preceded that of the company, may have been in effect an admeasurement of her dower, as the taxpayer argues, but, if so, it is irrelevant, unless from this it followed that she retained some interest in the lands. That she certainly did not do; the promise was not to pay her one-third of the profits in kind, to say nothing of giving her any right in the land itself; it was general and created a general obligation; had the company lost the money, even after the utmost diligence to keep it, it would still have been liable; payment and payment alone would be a discharge. The profits therefore belong to the taxpayer, though they measure its performance to the last cent; for good or ill the parties meant the widow to part with all interest in the land and its usufruct; she was to be content with the promise alone."

In the case at bar, Mr. Staley, Sr., the grantor, parted with all interest in the stock which he transferred to the Trustee. As in *Robert Hoe Estate Co., Inc., v. Commissioner, supra,* he "was to be content with the promise alone" to be paid the named consideration out of net income from the trust res. Mr. Staley, Sr., certainly *did not retain* any interests in the stocks which became trust res. Mr. Staley, Sr., the grantor, by no stretch can be treated as the beneficiary of the trust; he was only the grantor and the person who was to be paid the consideration named in the trust instruments. The written agreement between the grantor, Mr. Staley, Sr., and the Trustee fixing the consideration for the transfer was a contract and as in

*Robert Hoe Estate Co., Inc., v. Commissioner, supra,* created an obligation on the Trustee to pay the consideration fixed, agreed upon and contracted for. Payment of the consideration fixed in and by the trust instruments, and payment alone would be a discharge of the obligation of the Trustee to pay the named consideration.

The decision in the case at bar clearly is in conflict with the decision of the Circuit Court of Appeals for the Second Circuit in *Robert Hoe Estate Co., Inc., v. Commissioner,* 85 Fed. (2d) 4.

**Point 2. The Circuit Court of Appeals for the Fifth Circuit has decided a Federal question in a way probably in conflict with decisions of the Supreme Court of the United States.**

The Circuit Court of Appeals in the case at bar, by a divided court, held that a grant to a child with the understanding that the price could be paid out of the revenue from the property given and transferred was retained income to the grantor, Mr. Staley, Sr. This transaction for a named consideration is clearly restoration of capital assets. It is not claimed by the Commissioner that there was *a capital gain* to the grantor. Clearly, the holding in the case at bar is in direct conflict with the decisions of the Supreme Court of the United States that *in a transaction involving a restoration of capital, taxable income does not result unless the transaction results in capital gain to the taxpayer.*

In *Helvering v. Falk,* 291 U. S. 183, the beneficiary of a certain trust claimed the right to deduct from the total received, as a *return of capital assets,* his proportionate share of depletion. The court held that *a return of capital assets was not taxable* as income and at pages 188-189 said:

"True it is that Sec. 219 (b) directs that in cases of 'income which is to be distributed to the beneficiaries periodically,' * . . . 'the tax shall not be paid by the fiduciary, but there shall be included in computing the net income of each beneficiary that part of the income of the estate or trust for its taxable year which, pursuant to the instrument or order governing the distribution, is distributable to such beneficiary.' But we cannot accept the view that this was intended to impose a tax upon that part of the proceeds which represents *the return of capital assets,* whenever this has been paid over to the beneficiary."

The consideration exacted by the grantor, Mr. Staley, Sr., for the creation of the trust clearly was a restoration of capital to the grantor. The income from the trust res was applied to the benefit of the cestui que trust by discharging the indebtedness against the trust res which had been created by the contract between the grantor-seller and the Trustee. This contract was entered into at the time and as a part of the trust instruments.

Throughout the contention of the Commissioner, in a variety of forms, runs the fundamental error—a failure to appraise correctly the force of the term "income" as used in the Revenue Act of 1934, or at least to give practical effect to it—a failure to recognize that the consideration paid to Mr. Staley, Sr., by the Trustee, was a return of capital, not income.

The dissenting opinion of Mr. Justice Waller of the Circuit Court of Appeals in the case at bar clearly recognizes and appraises correctly the force of the term "income" as used in the Revenue Act and *holds that the consideration paid to the grantor was not income.*

**Point 3. The Circuit Court of Appeals for the Fifth Circuit has made a retroactive holding.**

In *Helvering v. Griffiths,* 317 U. S. ...; 87 L. ed. 597; 63 S. ct. 636, the Supreme Court of the United States, speaking through Mr. Justice Jackson, pointed out the hardships which would be incident to a retroactive holding as in the case at bar, condemned such retroactive holdings and said:

> "We are asked to make a retroactive holding that for some seven years past a multitude of transactions have been taxable although there was no source of law from which the most cautious taxpayer could have learned of the liability. If he consulted the decisions of this Court, he learned that no such tax could be imposed; if he read the Delphic language of the Act in connection with existing decisions, it, too, assured him there was no intent to tax; if he followed the Congressional proceedings and debates, his understanding of nontaxability would be confirmed; if he asked the tax collector himself, he was bound by the Regulations of the Treasury to advise that no such liability existed. It would be a pity if taxpayers could not rely on this concurrent assurance from all three branches of the Government. But we are asked to brush all this aside and simply to decree that these transactions are taxable anyway."

It is evident in the case at bar, that, at the time the trust instruments were executed, the consideration contracted for and agreed to be paid to the grantor, Mr. Staley, Sr., was not considered "income" to him either under the Revenue Act or the Regulations or the decisions of the Board of Tax Appeals or of any court of record. The Commissioner now seeks to have the courts make a retroactive holding that the transaction in the case at bar was taxable "although there was no source of law from which the most cautious taxpayer could have learned of the liability" (*Helvering v. Griffiths, supra*). Clearly the court will not aid the Commissioner and will not extend the Revenue Act by

implication beyond the clear import of the language used. The Supreme Court in *U. S. V. Merriam,* 263 U. S. 189 in no uncertain terms laid down the rule from which there can be no departure where it said:

> "But in statutes levying taxes the literal meaning of the words employed is most important, for such statutes are not to be extended by implication beyond the clear import of the language used. If the words are doubtful, the doubt must be resolved against the Government and in favor of the taxpayer."

## B. THE DECISION OF THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT SHOULD BE REVERSED ON THE MERITS.

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### Point 4. The consideration was not income within the definition of the Revenue Act.

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> "Gross income includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever, . . . "

Section 22(a) of the Revenue Act of 1934.

The statute does not impose an income tax upon everything which is *received* by the taxpayer.

*Shellabarger v. Commissioner of Internal Revenue,* 38 Fed. (2d) 566.
*Barnes v. Alexander,* 232 U. S. 117.

Income has repeatedly been defined by this court as gain *derived* from capital, from labor, or from both combined, including profit gained through sale or conversion of capital.

> *Bowers v. Kerbaugh Empire Co.,* 271 U. S. 170.
> *Strattons Independence v. Howbert,* 231 U. S. 399.
> *Doyle v. Mitchell Bros. Co.,* 247 U. S. 179.
> *Eisner v. Macomber,* 252 U. S. 189.
> *Merchants Loan & Trust Co. v. Smietanka,* 255 U. S. 509.
> *Goodrich v. Edwards,* 255 U. S. 527.

In the case at bar the consideration received by Mr. Staley, Sr., clearly did not represent a gain derived from capital, labor or from both combined or any gain or profit whatsoever. A. E. Staley, Sr., merely transferred his assets, and in consideration therefor received a different sort of property, namely, money, which was of far less value than the property transferred in trust, and, therefore, since it did not result in a gain clearly was not income to Mr. Staley, Sr.

**Point 5. The consideration was not income under Section 167 of Revenue Act.**

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"(a) Where any part of the income of a trust—

"(1) is, or in the discretion of the grantor or of any person not having a substantial adverse interest in the disposition of such part of the income may be, held or accumulated for future distribution to the grantor; or

"(2) may, in the discretion of the grantor or of any person not having a substantial adverse interest in the disposition of such part of the income, be distributed to the grantor; or

"(3) is, or in the discretion of the grantor or of any person not having a substantial adverse interest in the disposition of such part of the income may be, applied to the payment of premiums upon policies of insurance on the life of the grantor (except policies of insurance irrevocably payable for the purposes and in the manner specified in section 23 (o), relating to the so-called 'charitable contribution' deduction); then such part of the income of the trust shall be included in computing the net income of the grantor.

"(b) As used in this section, the term 'in the discretion of the grantor' means 'in the discretion of the grantor, either alone or in conjunction with any person not having a substantial adverse interest in the disposition of the part of the income in question'"

Section 167 of the Revenue Act of 1934.

(a) The decisions interpreting Section 167 as well as what was income under the Revenue Acts are immersed in confusion. In discussing the obscurity which exists under the Revenue Acts, not only as to Income tax, but also as to Estate and Gift taxes, Professor Paul in his recent Federal Estate and Gift Taxation, comments as follows in Vol. 1, sec. 7.32 at page 392:

> "Each amendment has added to the existing statute until we now have in the Internal Revenue Code an unintelligible conglomeration of language, which is in sad need of rearrangement and simplification."

And in Vol. 1, sec. 7.28, page 383:

> "The income tax decisions interpreting Section 167 furnish no useful analogy, even if the confusion in which they are immersed could be dissipated."

In Vol. 1, sec. 7.01, page 283:

> "It requires the most painstaking analysis to make any headway in understanding them; even today, after many years and attempts at clarification, few would

be bold enough to say they had mastered them. Bewildered administrative authorities and puzzled courts have added words to words, but little meaning emerges from the resulting thicket of obscurity."

And at pages 283-284:

> "We have been like Englishmen who never clean their slates; no language could be thrown away if anyone thought in optimistic vein that he understood its meaning. Amendments consisted of addition, duplication and overlapping. No one suggested the heroic remedy of fresh language which would clear away the debris and say simply what was plainly dictated by disillusioning experience with a statute that had repeatedly failed to say what the Treasury, at least, thought it meant."

In Vol. 2, sec. 17.08, page 1152:

> "Hope springs eternal in the breasts of taxpayers who yearn for certainty. One of the most perennial of taxpayer attitudes looks to the Supreme Court to clear away the debris of misunderstanding which accumulates around conflicting decisions of the Board and lower courts on difficult subjects."

The Supreme Court of the United States has often commented on this confusion and obscurity. In the recent case of *Helvering v. Griffiths,* 317 U. S. . . ; 87 L. ed. 597; 63 S. ct. 636, the Supreme Court in recognizing the injustice of efforts by the Commissioner to impose a tax liability by a retroactive holding said:

> "We are asked to make a retroactive holding that for some seven years past a multitude of transactions have been taxable although there was no source of law from which the most cautious taxpayer could have learned of the liability. If he consulted the decisions of this Court, he learned that no such tax could be imposed; if he read the Delphic language of the Act

in connection with existing decisions, it, too, assured him there was no intent to tax."

(b) The courts have repeatedly held that payments of a stated consideration by a grantee to a grantor, out of income from the conveyed property, *is not income to the grantor,* but is income to the grantee.

In *Curran v. Commissioner,* 49 Fed. (2d) 129, the court held that though the payment was in the form of a corporate dividend, it was in fact payment of agreed consideration for a building, therefore, a restoration of capital, *and not taxable income to the grantor.* In its opinion the court stated:

> "There is no dispute that this payment to petitioner by the corporation was in the form of a corporate dividend, although the dividend was hedged about the restrictions which are entirely unusual. The theory of a dividend is that it shall be payable only from net earnings which are or may be ready for actual distribution at a definite date provided for in the resolution declaring the dividend. But here, although the actual net earnings of the corporation at the time this dividend was declared were sufficient to pay it, there was no definite date set for payment, but, on the contrary, the amount of the dividend was to be merely credited on the corporation books, to bear interest (payable quarterly) and could not be withdrawn except on order of the management.
>
> ". . . .
>
> "The Board found there was a sale. It finds that 'it was finally agreed that the corporation would pay and he would take $150,000. for the property. The petitioner then executed and delivered the deed to the property which was recorded October 13, 1920. No payment was made to the petitioner on account of the transfer of the property in 1920.' The findings following the quotation just made leave no doubt of

the view of the Board that this 'dividend' for $150,000.00 declared January 15, 1921, was really a payment of this purchase price. In this connection there is a significant statement in the opinon of the Board on the finding as follows: 'We are convinced from all the evidence that the petitioner intended that the corporation should pay $150,000.00 for the property. We also believe that the petitioner was satised with the action as taken by the corporation in declaring and paying the dividend.' We think the findings must be construed as being that the property was sold to the corporation, and that payment therefor was through the medium of this 'dividend'. *Further, it may be said that, once given the finding that this transaction was a sale, there is no support in the evidence for any view as to the dividend, except that it was in payment therefor.*

"Upon such findings, the Board could not properly affirm the action of the Commissioner that this payment to petitioner was taxable as a dividend. *The payment was, except in bare form, no dividend, but it was really a payment for property purchased at what the evidence shows was less than its real value."* (emphasis ours.)

Likewise, in the instant case, Mr. Staley, Sr., was not a beneficiary under the Trusts. He was named as a creditor who was to be paid a consideration for the transfers of the stock which constituted the corpus of the trust estate. The consideration became and was a charge against the corpus of the trust estate at the time of the execution of the trust instruments.

Scott, Law of Trusts, vol. 1, sec. 10.3, page 71.

The rule that the mere fact that one receives a dividend or a payment does not make such dividend or payment taxable as income to the party receiving the same is clearly set forth in *Shellabarger v. Commissioner,* 38 Fed. (2d) 566, as follows:

"The mere fact of Maud's receiving it does not indicate that it was taxable income. The statute (Act June 2, 1924, Chap. 234, sec. 213 (a), 43 Stat. 267) does not impose an income tax upon everything which is received by the taxpayer. Many items may be received which are not taxable income of the respondent. 'Derive'—not 'receive'—is the word the statute employes."

(c) The obligation to pay the consideration was a debt of the trustees to the grantor.

"Where the owner of property transfers it in trust, it is of course a valid trust although he received no consideration for creating it. Indeed, in most cases where property is transferred in trust, the transaction is gratuitous."

Scott on Trusts, Vol. 1, sec. 29, page 178.

Although an executed deed or conveyance in trust requires no consideration, yet, if made for a promised consideration, the promise is enforcible and the consideration, if monetary, may be collected as a debt.

Professor Scott, in his recent work in The Law of Trusts announces the well established rule that a contract between the settlor and the trustee entered into in connection with the creation of a trust is enforcible and in Vol. 2, Sec. 197.2 at pages 1069-1070 says:

"In conection with the creation of a trust the trustee may of course enter into a contract with the settlor. He may agree to do something other than merely to perform his duties as trustee. . . . In such a case if he fails to carry out his promise an action at law for breach of contract can be maintained against him by the settlor."

The obligation under an express trust to pay a named consideration may be payable at a fixed time, or on demand

or on an installment basis. Where there is a legal obligation to pay, as in the case at bar, the terms of the trust instrument control the time and manner of payment.

> *Lobban v. Wierhauser,* (Texas) 141 S.W. (2d) 384.

The courts of Tennessee have held that where there is an expressed consideration in the trust instrument the settlor may and has the right to bring an action for specific performance. (*Farrell v. Third National Bank in Nashville,* (Tenn.) 101 S. W. (2d) 158). In the last cited case several trust instruments were executed concurrently by brothers and sisters with a recital in each that the instrument is executed by the settlor in consideration of the settlor's brothers and sisters executing a substantially similar trust. All of the trusts were executed. Subsequently, the trust executed by one of the settlor's brothers in New York was held to be null and void. The court held that the settlor could file a bill for specific performance based on the express consideration set out in her trust instrument.

In the case at bar the trust instruments clearly were enforcible contracts between the settlor and the trustee. By each of these trust instruments the trustee became obligated and indebted to the settlor in the amount of $30,000.00, the consideration moving from the trustee to the settlor for the execution of each of these trusts. Clearly this indebtedness was not income to the settlor, A. E. Staley, Sr.

There is no power under sections 161, 162, 167 or section 22a of the Revenue Act of 1934 authorizing the deficiency tax fixed by the commissioner in this cause or bringing the moneys received by Mr. Staley, Sr., within the definition of "income".

"If the person sought to be taxed comes within the letter of the law, he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown, seeking to recover the tax, cannot bring the subject within the *letter of the law,* the subject is free, however apparently within the spirit of the law the case might otherwise appear to be." (Italics ours.)

*United States v. Merriam,* 263 U. S. 179.

See also:

*DeGanay v. Lederer,* 250 U. S. 376.

The position of the Commissioner in this case is unique and the decision of the Circuit Court of Appeals in the Fifth Circuit is in line with the claim of the Commissioner.

No attempt has been made to deny that the construction of the trust instruments as between Mr. Staley, the grantor, of the one part and the Trustee and the beneficiaries of the other part means other than that the sums named in the instrument were to be paid as a consideration for the making of the trust indentures and transfer of the stock. The construction sought by the Commissioner is that under the Federal Statutes the money paid to Mr. Staley was "income" and that while the first above mentioned construction as between Mr. Staley and the other contracting parties is correct and enforceable as between them, there is another construction under the Federal Statutes to the end that the money so paid as the consideration named in the trust instrument is "income". The statutes are perfectly clear and no law exists by which the income in this case can be made to extend to the money paid to Mr. Staley. The plain, obvious and rational meaning of a statute is always to be preferred to any curious, narrow hidden sense that nothing but the exigency of a hard case and the ingenuity and study of an acute and powerful

intellect would claim that by implication they were included in the Act.

*Imperial Fire Insurance Company v. Coos County,* 151 U. S. 452.
*U. S. v. Deans,* (CCA-8) 230 Fed. 957.
*U. S. v. Ninety-Nine Diamonds,* (CCA-8) 139 Fed. 961, 965.
*Martha Stevens v. Nave-McCord Mercantile Co.,* (CCA-8) 150 Fed. 71, 75.
*Standard Life & Accident Ins. Co. v. McNulty,* (DC) 157 Fed. 224, 226.
*Delaware Ins. Co. v. Greer,* (DC) 120 Fed. 916, 921.

If the construction of the Revenue Acts claimed by the Commissioner is to prevail it must be under a statute bringing the case within the provisions of the Act. No power exists to supply an omission in the law by which the courts may extend the express words in the Act employed to produce or create a mischievous and absurd addition to the law for the purpose of collecting a tax.

**Point 6. The $150,000.00 consideration received by the grantor-seller, Mr. Staley, Sr., was a restoration of capital.**

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Under the admitted facts in this case Mr. Staley, Sr., transferred common and preferred stocks for a consideration of $150,000.00 to be paid by the trustees under the five trusts. For such transaction he received a valid legal promise to pay to him $150,000.00 and subsequently in lieu of the promise and the stock by him transferred he received the cash which merely restored to him certain of his capital without any capital gain to him.

*Eisner v. Macomber,* 252 U. S. 189.
*Helvering v. Falk,* 291 U. S. 183.
*United States v. Ludey,* 274 U. S. 295.

The $150,000.00 consideration so received was a restoration of capital and was not income.

> *Robert Hoe Estate Co., Inc. v. Commissioner,* 85 Fed (2d) 4.
>
> *Curran v. Commissioner,* 49 Fed. (2d) 129.
>
> *Shellabarger v. Commissioner,* 38 Fed. (2d) 566.

**Point 7.** **Consideration**

The Trust Indenture executed by Mr. Staley specifically recited that his undertakings (by him fully executed concurrently with the delivery of the trust instrument) was for a named "consideration" to be to him paid as in the trust instrument provided.

Professor Williston (Vol. 1, sec. 103c) in substance states that, while mutual promises are not always a sufficient consideration, the test as laid down by able writers is:

> "1. Sir Frederick Pollock and Professor Langdell apply this test: If the obligation of a promise would be a detriment to the promisor (assuming that the promise creates a binding obligation) the promise is sufficient consideration.
>
> "2. 'That most accurate of writers, Mr. Stephen Leake,' whose work on contracts has long been a standard treatise, says, however,—
>
> " 'So far as regards the matter of the consideration, as being executed or executory, it may be observed that whatever matter, if executed, is sufficient to form a good executed consideration; if promised, is sufficient to form a good executory consideration; so that the distinction of executed and executory consideration has no bearing upon the question of the sufficiency of any particular matter to form a consideration.' "

Consideration is the moving cause of transfers.

*Donahoe v. Rich,* (Ind.) 28 N. E. 1001.
*Blair Engineering Company v. Page Steel and Wire Company,* 288 Fed. 662.
*Cassinelli v. Stacy,* (Ky) 38 S. W. (2d) 980.

Each of the Trust Indentures recite that it was made and the stock transferred "in consideration" of the sum of $30,000.00 to be to Mr. Staley paid in each of the five trusts in the manner therein provided. In accordance with such provisions the $30,000.00 was paid. No controversy arises under the record in this case as to the clear provisions so expressed in the instrument nor is there any evidence to dispute the express distinct provisions of the instrument.

Professor Williston (Williston on Contracts, Vol. 1, page 242) states:

> "It is at least well settled that the recital of consideration in a deed of conveyance estops the grantor to deny the existence of that consideration for the purpose of impeaching the validity of the deed, as a deed of bargain and sale." (See cases there cited).

While the original rule at common law forbidding parole evidence to explain the consideration has been relaxed, nevertheless, it is established that at the present time even though the "consideration" in fact was entirely different from the consideration named in the deed, not merely additional to it, the truth may be shown for any purpose *except the impeachment of the validity of the deed for lack of consideration unless the stated consideration is promissory in character and not merely a recital in fact.*

Williston on Contracts, Vol. 1, sec. 115a and cases there cited.

Damages to the promisee constitute as good a consideration as benefit to the promisor.

> *Townsley v. Sumrall,* 2nd Peters 170-182.
> *United States v. Linn, et al.* 15th Peters 290.
> *Cuneo Press, Inc. v. Claybourn Corp.,* 90 Fed. (2d) 233-236.

Courts will avoid a construction which will make a law operate with glaring inequality and palpable injustice.

> *Knowlton v Moore,* 178 U. S. 41.
> *Eidman v. Martinez,* 184 U. S. 578.
> *American Net and Twine Co. v. Worthington,* 141 U. S. 468.
> *Hartranft v. Wiegmann,* 121 U. S. 609.
> *United States v. Isham,* 17th Wall. 496.

**Point 8. The trust instruments were contracts.**

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(a) A trust instrument, supported by a legal and valuable consideration, is a binding contract between the settlor and the Trustee. This universally followed rule of law is announced by Roscoe Pound in his article, Consideration in Equity, 13 Ill. Law Review, 669, where he said:

> "The creation of an express trust is analytically a legal transaction of the same order as a contract."

In *Underhill v. United States Trust Co.,* (Ky.) 13 S. W. (2d) 502, at page 505 the court said:

> "A voluntary deed of trust, as suggested by the learned chancellor in his excellent opinion, *is a binding contract* between the settlor and the trustee acting for the cestuis que trust, supported by a legal and valuable consideration. . . . Burton v. Burton's Trustee, 198 Ky. 429, 248 S. W. 1033."

And in *Lobban v. Wierhauser,* (Texas) 141 S. W. (2d) 384; at page 385, the court stated:

> "An express trust is one which results from, and is based on, *a contract* which involves the separation of the legal and the equitable title, Wheeler v. Haralson, 128 Tex. 429, 99 S. W. 2d 885."

In the case of *Hutchison v. Ross,* (N. Y.) 187 N. E. 65; at pages 71-72 the court said:

> "The difficulty in this case is that on the face of the contract the conveyance in trust seems to have been made, at least partly, in consideration of the revocation of the provisions of the marriage contract and according to the recitals 'in lieu of the provisions * * * contained in said contract of marriage settlement.' Though an executed deed or conveyance in trust requires no consideration (Stiebel v. Grosberg, 202 N. Y. 266, 95 N. E. 692, 36 L. R. A. (N.S.) 1147, Ann. Cas. 1912D, 1305), yet, if made for a promised consideration 'which fails, the conveyance may be revoked. . . . Upon the face of the agreement the wife's renunciation is the consideration for the husband's conveyance in trust."

Where an express trust agreement is entered into for a valuable and legal consideration, court will enforce it as a contract.

Perry on Trusts, 7th ed., Vol. 1, pages 109-110.

(b) Trust instruments are to be construed as contracts. In construing contracts words must have the sense in which parties understood them and the court will consider the nature of the contract, the object to be attained and all the circumstances to reach the intention of the parties.

*Aetna Insurance Company v. Boon,* 95 U. S. 117.
*Florida Central Railroad Company v. Schutte,* 103 U. S. 118.
*Green v. Biddle,* 21 U. S. 1, 8th Wheat. 1.
*Dundas v. Hitchcock,* 53 U. S. 256.
*The Chenango Bridge Co. v. Binghamton Bridge Co.,* 70 U. S. 51.

It is the province of courts to enforce contracts, not to make or modify them.

*The Harriman vs. Emerick,* 76 U. S. 161.

The intention of the parties is the contract and whenever it is ascertained, however inartificially expressed, it is the duty of the court to give it effect.

*Bradley v. Washington, Alexandria and Georgetown Packet Co.,* 38 U. S. 89.
*George v. Tate,* 102 U. S. 564.
*Ogden v. Saunders,* 25 U. S. 213.
*Delaware and Hudson Canal Company v. Pennsylvania Coal Company,* 75 U. S. 276.

**Point 9. The taxpayer had the right to exact a payment as consideration.**

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Mr. Staley, Sr., the grantor in the five trusts, had the right to exact payment of money or property as *consideration* for the creation of the trust.

"Effect is given to the *consideration* to carry out the intention of the parties."

Perry on Trusts, 7th ed., Vol. 1, Page 111.

A grantor had the right to exact a promise from the Trustee to perform certain acts as consideration for creation of the trusts, which promise is enforceable.

*Ketcham v. Miller,* (Texas) 37 S. W. (2d) 635.
*Hutchison v. Ross,* (N. Y.) 187 N. E. 65.

Courts do not take any peculiar position with regard to the meaning of consideration in trust instruments. "They . . . apply the same criteria as they would use in regard to any other contract."

Bogart, Trusts and Trustees, Vol. 1, Ch. 12, Sec. 204, page 579.
Roscoe Pound, Consideration in Equity, 13 Ill. Law Review 667-692.

The consideration may be a detriment either to the Trustee or the cestui.

> Bogart, Trusts and Trustees, Vol. 1, Ch. 12, Sec. 204, Page 579.
> *Pass v. Stephens*, (Ariz.) 198 P. 712.
> *Frazer v. Stokes*, (Va.) 71 S. E. 545.

Respectfully submitted,

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